# Babich Goldman

Leslie Babich Rvan D. Babich Todd E. Babich Kodi A. Brotherson

Michael I. Carroll Brent A. Cashatt\* Thomas W. Folev

David H. Goldman

lenna L. Green Joseph A. Renzo Stacey N. Warren\*

### Attorneys at Law

Michael J. Carroll mcarroll@babichgoldman.com 515.309.6822 direct phone 515.309.6823 direct fax

\*Fellow of the American Academy of Matrimonial Lawyers

September 13, 2011

### VIA FED EX – OVERNIGHT DELIVERY

National Labor Relations Board Office of the Executive Secretary 1099 14th Street NW Washington, D.C. 20570

Re:

Des Moines Cold Storage, Inc. and General Team and Truck Drivers, Helpers and Warehousemen, Local 90

Case 18-CA-19653

Dear Executive Secretary:

Enclosed for filing are nine copies of the Respondent's Exceptions to Decision of Administrative Law Judge on behalf of Des Moines Cold Storage, Inc. in the above case. It would be appreciated if you would return a file-stamped copy to my office in the enclosed reply envelope.

Please contact me or my Legal Assistant, Shelly Evans, if you have any questions. Thank you.

Very truly yours suffanoy

Michael J. Carroll

MJC/se

Respondent's Exceptions to Decision of Administrative Law Judge

Cc: Edward C. Muelhaupt, III

> Abby E. Schneider/Pamela W. Scott Nathan D. Eisenberg/Sara J. Geenen

Pat Navin

OBOEK SECTION
ZOILSEP IT PMIZ: 01

## BEFORE THE NATIONAL LABOR RELATIONS BOARD

DES MOINES COLD STORAGE, INC.,

CASE 18-CA-19653

Respondent,

and

GENERAL TEAM AND TRUCK DRIVERS, HELPERS AND WAREHOUSEMEN, LOCAL 90, RESPONDENT'S EXCEPTIONS TO DECISION OF ADMINISTRATIVE LAW JUDGE

Charging Party.

Pursuant to Section 102.46 of the Rules and Regulations of the National Labor Relations Board, the Respondent, Des Moines Cold Storage, makes the following exceptions to the August 17, 2011, decision of the Administrative Law Judge Earl E. Shamwell Jr.:

- A. <u>Background and Undisputed Facts</u>.
- 1. Respondent takes exception with the finding that the most recent collective bargaining agreement ("CBA") was effective from April 1, 2010, to March 31, 2013. (ALJD 3:14-16). The most recent CBA was not signed until July 26, 2010. (GC Ex. 10). As such, no CBA was in effect on July 20 or 23, 2010. No credible evidence was produced to the contrary. (GC Ex. 10).
- 2. Respondent takes exception with the finding that the negotiations regarding the new CBA concluded in May 2010. (ALJD 3:12-13). In fact, negotiations regarding health insurance (Article 14) and the cost of living (Article 25) were ongoing until late July 2010 because the Respondent was unaware of what the new premium rates would be for health insurance. (GC Ex. 10; Tr. 125:11-126:10, 127:14-19). Ultimately, the Union agreed the cost of living would not be applicable during the term of the CBA. (GC Ex. 10, Letter of

Understanding). Additionally, Article 14 was amended after negotiations to remove the language that the Respondent would pay for the members' health insurance premiums. (GC Ex. 10).

#### B. Discussions and Conclusions.

- 3. Respondent takes exception with the conclusion that the language was inadvertently omitted from Article 14 regarding the Respondent continuing to pay the entire insurance premium for the employees. (ALJD 19:38-40). In fact, the language in Article 14 was omitted after bargaining between the Union and Respondent, and was controlled by the Union. Union representative Patrick Navin admitted the subject agreement was on his computer, that he wrote it (made changes, etc.) and could have written the agreement in such a way that clearly stated what he asserted at hearing was the agreement of the parties. He did not do that. (Tr. 127:20-128:12, 145:2-14). There are 444 lines of text in the collective bargaining agreement between the Union and Respondent. (GC Ex. 10). The only other changes to the CBA regarded wage increases. The probability of Article 14 changing 'accidentally' when that language is at the core of the dispute is low. If anything, Navin would have focused more attention to Article 14 before he had the CBA signed on July 26, because there was significant discussion about health insurance.
- 4. Respondent takes exception with the conclusion that Navin did not give Muelhaupt permission to present the insurance proposal to the membership. (ALJD 20:18-20). Muelhaupt credibly testified that he only presented the health insurance pricing information to the membership after receiving permission from Navin to get their feedback. (Tr. 24:1-21, 25:5-8, 30:3-31:5).

- 5. Respondent takes exception with the conclusion that Muelhaupt did not bargain with the Union regarding the health insurance. (ALJD 19:55-20:6). Respondent met with the Navin at least twice after Muelhaupt notified employees of the proposed health insurance premium payments and at no time did Navin attempt to negotiate regarding the health insurance issue. (ALJD 5:39-41, 7:8-13). Moreover, Winters, the union steward, acknowledged that he could not recall either E.C. Muelhaupt or Chuck Muelhaupt telling him or Navin that Respondent would continue to pay 100 percent of the premiums. (ALJD 9:48-49).
- 6. Respondent takes exception with the conclusion that the Union did not assent to the agreement proposed by the Company for employees to pay a portion of premiums. (ALJD 19:42-47). The Company signed the agreement with the understanding that it was mutually agreed upon that employees would pay a portion of health insurance premiums per the proposed pricing presented July 20, 2010. (Tr. 138:1-9, 138:14-19).
- 7. Respondent takes exception with the conclusion that it failed to provide information requested by the Union. (ALJD 20:35-54). Article 9 of the CBA requires all grievances to be put in writing within seven working days from the date the cause for the grievance occurred. (GC Ex. 10). The premium change for the employee health insurance went into effect on August 1, 2010. (Tr. 35:5-7). As such, any grievances regarding the member paying a portion of the health insurance premium would need to be submitted before August 10, 2010, seven working days after August 1, 2010. (GC Ex. 10). Because Winters' grievance was not timely filed, Respondent was under no duty or obligation to respond to the Union's request for information regarding the grievance.
- 8. Respondent takes exception with the decision not to consider the declaration of Chuck Muelhaupt. (ALJD 4:53-56). E.C. Muelhaupt clearly testified Chuck Muelhaupt was

unavailable due to illness or infirmity. (Tr. 135:25-136:12). Because Chuck Muelhaupt was unavailable, the ALJ erred in failing to consider his sworn declaration.

Respectfully submitted,

Michael J. Carroll

Babich Goldman, P.C.

100 Court Avenue, Suite 403

Des Moines, IA 50309

Telephone: (515) 244-4300 Facsimile: (515) 244-2650

E-mail: mcarroll@babichgoldman.com

ATTORNEY FOR RESPONDENT DES MOINES COLD STORAGE, INC.

### Copies to:

Abby E. Schneider Pamela W. Scott National Labor Relations Board Region 18 330 South 2<sup>nd</sup> Avenue, Suite 790 Minneapolis, MN 55401 Telephone: (612) 348-1757 Facsimile: (612) 348-1785

ATTORNEY FOR NATIONAL LABOR RELATIONS BOARD

Nathan D. Eisenberg
Sara J. Geenen
Previant, Goldberg, Uelmen, Gratz,
Miller & Brueggeman, S.C.
1555 N. RiverCenter Dr., Suite 202
Milwaukee, WI 53212
Telephone: (414) 271-4500
Facsimile: (414) 271-6308

ATTORNEYS FOR GENERAL TEAM AND TRUCK DRIVERS, HELPERS AND WAREHOUSEMEN, LOCAL 90

Pat Navin
General Team and Truck Drivers, Helpers
and Warehousemen, Local 90
2425 Delaware Avenue
Des Moines, IA 50317
Telephone: (515) 262-3194, Ext. 12

Facsimile: (515) 262-3542

BUSINESS AGENT FOR GENERAL TEAM AND TRUCK DRIVERS, HELPERS AND WAREHOUSEMEN, LOCAL 90

CERTIFICATE OF SERVICE The undersigned certifies that the foregoing instrument was several upon all parties to the above cause to each of the attorneys of record herein at their respective and reservices of colosed on the	
By: ☑ U.S. t.laii	[] FAX
Hand Delivered Certified Mail Signature	Overnight Courier  Other  Wass

RECEIVED

2011 SEP 14 PM 12: 01

ORDER SECTION

12 1 From: (515) 244-4300 Shelly Evans

100 Court Avenue Suite 403 Des Moines, IA 50309 Origin ID: DSMA



Ship Date: 13SEP11 ActWgt: 1 0 LB CAD: 103039170/INET3180

Delivery Address Bar Code



SHIP TO: (202) 273-1067 BILL SENDER Office of Executive Secretary

**National Labor Relations Board** 1099 14TH ST NW

**WASHINGTON, DC 20005** 

Des Moines Cold Storage Ref#

Invoice # PO# Dept#

7951 8317 3393 0201

WED - 14 SEP A1 STANDARD OVERNIGHT

**XC BZSA** 

20005 DC-US **DCA** 



After printing this label.

1. Use the Print buttor on this plage to print you, label to your later or linglet printer.

2. Point the included page along the horizonter line.

3. Place label in shipping pouch and affix it to your shipment so that the barcode portion of the label can be read and scanned.

Warning Due only the printed drights label for shipping. Jemp a phonocopy of this label for shipping purposes is fruit due to an experiment of the printed drights account number.

Jee of this system constitutes your profits account number.

Lee of this system constitutes your greement to the service conditions in the current FedEx Service Guide, available on fedex.com FedEx will not be responsible for any claim in excess of \$100 per package, whether the result of loss, damage, delay, non-delivery misdelvery or misinformation, unless you delete a higher value, pay an additional charge, documently our actual loss and file a birthey claim. Limitations found in the current FedEx Service Guide ppty Your right to recover from FedEx to service shirtless income interest, profit, attorney's fees, costs, and other forms of damage whether direct, incidental consequential, or special is limited to the greater of \$100 or the authorized declared value. Recovery cannot exceed actual documented loss Maximum for items of extraordinary value is \$500, e.g. jewelry, precious metals, negotiable instruments and other items listed in our ServiceGuide. Written claims must be filed within strict time limits, see current FedEx Service Guide.